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THE AMERICANS WITH DISABILITIES ACT: A MODEL FOR TITLE VII ENFORCEMENT

Stephen L. Mikochik[†]

We hear much today about family values — though much that we hear is simply electioneering. Yet, even presidential politics cannot obscure the fact that the American family is in trouble; that trouble is made worse by the reluctance of business to adapt personnel practices to the changing American family.

Once, business capitalized on a division of labor that saw wives maintain the home, freeing business to monopolize their husbands' concerns. Now, with the vast influx of women workers and the alarming rise in single-parent households, business can no longer expect such fealty, but must at last confront demands to treat workers as whole persons whose family commitments sometimes require accommodation. A real respect for family values would not leave these demands unmet; if we truly valued families, we would insure that business actually respected its workers' family commitments.

Congress is considering family leave legislation during this election year.¹ Rather than assessing the merits and political prospects of such initiatives, I propose instead to pursue an alternative route charted by way of existing law. Title VII of the Civil Rights Act of 1964² forbids sex discrimination in employment and condemns the practices of the past that were facially neutral, yet disparate in their effects upon women workers.³ The denial of family leave arguably impacts women workers more heavily than men, and thereby is open to Title VII attack, provided we temper the broad deference typically bestowed upon business discretion.

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¹ See H.R. CONF. REP. NO. 816, 102nd Cong., 2d Sess. (1992) (to accompany S. 5, the Family and Medical Leave Act of 1992).

² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified at 42 U.S.C. § 2000e (Supp. II 1990)).

³ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (invalidating height and weight requirements for Alabama state prison guard positions).

A balanced approach is needed to reconcile both business' and workers' particular needs. The Americans with Disabilities Act⁴ (ADA) provides such balance on a grand scale. The ADA requires employers to take reasonable affirmative steps to accommodate the impairments of workers with disabilities — the largest minority in America. If valuing each human person requires business to take some account of the ways workers with disabilities live their lives, then fairness and the indispensable human family demand a like concern for the family lives that all workers live.

This article begins by considering the ADA and its proscription of employment practices that, in effect, discriminate. Title VII's disparate impact analysis, which the Burger Court developed to address the artificial barriers that blocked minorities' access to the labor force,⁵ foreshadowed the ADA's focus upon proscribing discriminatory effect. The Rehnquist Court later revised⁶ Title VII disparate impact analysis to better defend employer prerogatives by approximating a test of intent.⁷ The Civil Rights Act of 1991⁸ has rejected that revision, yet has offered no real guidance in its place. This allows for the prospect of more restrictive readings in the future. This article concludes that the ADA, with its balanced concern for employers and employees alike, can provide the needed guidance, if not for all of Title VII's applications, at least for disparate impact analysis and the issue of family leave.

⁴ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. II 1990) and 47 U.S.C. §§ 225, 611 (West 1991)).

⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁶ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

⁷ Cf. GERALD GUNTHER, CONSTITUTIONAL LAW 708 n.10 (12th ed. 1991) ("The effect of *Wards Cove* was to narrow the gap between what is required to make out a prima facie case of an equal protection violation and what is necessary to make out a prima facie case of a statutory claim under Title VII."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 2 U.S.C. §§ 601 & 1201-1224, 29 U.S.C. § 626, & 42 U.S.C. § 1981 and scattered sections).

The ADA forbids discrimination on the basis of disability in the terms, conditions, and privileges of employment.⁹ That Congress intended the ADA to prohibit purposeful discrimination¹⁰ is not surprising given the grotesque treatment that disabled people have at times endured.¹¹ Most of the difficulties that disabled people encounter, however, are not the product of animus, but rather of neglect¹² — the thoughtless erec-

⁹ See 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). See also 29 C.F.R. § 1630.4 (1991).

¹⁰ In passing the ADA, Congress found that "individuals with disabilities are a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment," 42 U.S.C. § 12101(a)(7), and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis." *Id.* § 12101(a)(9). See S. REP. NO. 116, 101st Cong., 1st Sess. 6-8 (1989) ("Historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society."); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 28-31 (1990); 135 CONG. REC. S10,708 (daily ed. Sept. 7, 1989) (remarks of Sen. Harkin, Chair, Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, and the Act's principal Senate sponsor). Cf. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987) ("[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." (footnote omitted)). The ADA accordingly was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

¹¹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461-462 (1985) (Marshall, J., concurring in part and dissenting in part) ("[T]he mentally retarded have been subject to a 'lengthy and tragic history' . . . of segregation and discrimination that can only be called grotesque A regime of state-mandated segregation and degradation [of retarded persons] . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." (citations omitted)). See also *Arline*, 480 U.S. at 278 n.2 (1987) ("[N]egative attitudes and practices toward the disabled resemble those commonly attached to underprivileged ethnic and religious minority groups." (quoting Jacobus TenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814-15 (1966))); *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985) ("To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist." (citations omitted)).

¹² See *Choate*, 469 U.S. at 295 ("Discrimination against the handicapped was perceived by Congress [in passing predecessor legislation] to be most often

tion of architectural, transportation, and communication barriers that impede their access to virtually every aspect of public life.¹³ As the United States Supreme Court observed, legislation for disabled people would "ring hollow" if it "could not rectify the harms resulting from action that discriminated by effect as well as by design."¹⁴

Consequently, Congress focused much of the ADA's attention on the adverse effects of employment decisions.¹⁵ The ADA's provisions define forbidden discrimination to include the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related[,] . . . consistent with business necessity,"¹⁶ and "such performance cannot be accomplished by reasonable accommodation"¹⁷

the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect." (alteration added) (footnote omitted)). See also S. REP. NO. 116, *supra* note 10, at 6 ("Discrimination results from actions or inactions that discriminate by effect as well as by intent or design"); H.R. REP. NO. 485, pt. 2, *supra* note 10, at 29.

¹³ See S. REP. NO. 116, *supra* note 10, at 6-15; H.R. REP. NO. 485, pt. 2, *supra* note 10, at 34-39; 135 CONG. REC. S10,708 (daily ed. Sept. 7, 1989) (remarks of Sen. Harkin); *id.* (remarks of Sen. Cranston, the principal Senate sponsor of § 504 of the Rehabilitation Act of 1973); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 5-55 (1989) (statements of Rep. Tony Coelho, House majority whip and the Act's principal House sponsor; Dr. I. King Jordan, President, Gallaudet University; Justin Dart, Chair, Task Force on the Rights and Empowerment of Americans with Disabilities; Mary DeSapio; Joseph F. Danowsky; Amy Dimsdale; Harold Russell, Chair, President's Committee on Employment of People with Disabilities; Zachary Fasman; Lawrence Z. Lorber; Arlene B. Mayerson).

¹⁴ *Choate*, 469 U.S. at 297 (footnote omitted).

¹⁵ See, e.g., 42 U.S.C. § 12112(b)(1)-(3)(A) ("[T]he term 'discriminate' includes — (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this [Act]; . . . (3) utilizing standards, criteria, or methods of administration — (A) that have the effect of discrimination on the basis of disability.").

¹⁶ *Id.* § 12112(b)(6). See 29 C.F.R. § 1630.10 (1991).

¹⁷ 42 U.S.C. § 12113(a). See 29 C.F.R. § 1630.15(b)(1) (1991). The ADA

These provisions are not new. They track regulations implementing § 504 of the Rehabilitation Act of 1973,¹⁸ which attempted to adapt "the principle [of disparate impact] established under Title VII" to the circumstances of disability.¹⁹ That principle was first articulated over two decades ago. Yet, its enforcement in Title VII law is at a crossroad today as a result of the Rehnquist Court's restrictive reading and Congress' less than definitive response.

Title VII forbids employment practices that "deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."²⁰ As first construed by the Supreme Court in *Griggs v. Duke Power Co.*,²¹ this language revealed Congress' intent to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate[d] invidiously to discriminate on the basis of racial or other impermissible classification."²² *Griggs* commanded that, in order to survive

does not define "qualification standards" comprehensively. Cf. 42 U.S.C. § 12113(b) (including the absence of a "direct threat" as a permissible qualification standard). But EEOC's enforcement regulations provide that the term includes "the skill, experience, education, physical, medical, safety and other requirements . . . which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (1991).

¹⁸ See Dept. of Health and Human Services Employment Criteria Rule, 45 C.F.R. § 84.13(a) (1991) ("A recipient [of Federal financial assistance] may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the [funding agency] . . . to be available.").

¹⁹ 45 C.F.R. § 84.13(a). Portions of the ADA are substantially similar to Title VII. For example, the ADA incorporates several key definitions found in Title VII. See 42 U.S.C. § 12111(7) ("The terms 'person,' 'labor organization,' 'employment agency,' 'commerce,' and 'industry affecting commerce' shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e)"). See also 29 C.F.R. § 1630.2(c). Additionally, the ADA also adopts Title VII enforcement procedures. See 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures . . . [the employment title of the Act] provides.").

²⁰ 42 U.S.C. § 2000e-2(a)(2).

²¹ 401 U.S. 424 (1971).

²² *Id.* at 431.

judicial scrutiny, an employer engaging in a neutral employment practice that had the negative effect of depriving an individual of equal opportunities based on race or sex (as evidenced by its substantially disparate effect on minorities or women), must also show that the employment practice had a positive effect, by demonstrating that it had "a manifest relationship to the employment in question."²³

During the 1970s, the Court revisited *Griggs* in a series of cases — including *Albemarle Paper Co. v. Moody*,²⁴ *Washington v. Davis*,²⁵ and *Dothard v. Rawlinson*²⁶ — so that, by 1982, the Court had developed some structure for disparate impact analysis:

To establish a prima facie case of discrimination, a plaintiff . . . [must] show that the facially neutral employment practice had a significantly discriminatory impact [T]he employer then . . . [was obliged to] demonstrate that any given requirement [had] a manifest relationship to the employment in question Even in such a case, however, the plaintiff . . . [might] prevail, if he show[ed] that the employer was using the practice as a mere pretext for discrimination.²⁷

By 1989, with its personnel changing, the Court had begun to enforce this structure more leniently, fearing that strict

²³ *Id.* at 432.

²⁴ 422 U.S. 405, 431 (1975) (Employment tests with substantially disparate effects "are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" (quoting 29 C.F.R. § 1607.4(c))).

²⁵ 426 U.S. 229 (1976) (applying Title VII principles to D.C. Code § 1-320 (1973)).

²⁶ 433 U.S. 321, 329 (1977) ("If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.'" (quoting *Albemarle*, 422 U.S. at 425, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)) (further internal quotations omitted).

²⁷ *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (internal quotations and citation omitted).

enforcement would encourage employers to resort to quota hiring.²⁸ Thus, according to *Wards Cove Packing Co. v. Atonio*,²⁹ once plaintiff established a prima facie case, "the employer carri[ed] the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remain[ed] with the disparate-impact plaintiff."³⁰ Though plaintiff could continue to prove pretext by showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s],"³¹ such practices "must be [as] equally effective as . . . [the employer's] chosen hiring procedures Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective."³²

Griggs itself made this turnabout possible through its ambivalence regarding the nature of disparate impact analysis. In one view, the thrust of *Griggs* is captured in Chief Justice Burger's assertion that "[w]hat Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."³³ This interpretation emphasizes "the removal of artificial, arbitrary, and unnecessary barriers to employment"³⁴

Concern for the employer's needs dominates this view.³⁵

²⁸ See *Wards Cove*, 490 U.S. 642, 652 ("The only practicable option for many employers [to avoid costly validation studies of practices with a disparate effect] would be to adopt racial quotas.").

²⁹ *Id.*

³⁰ *Id.* at 659.

³¹ *Id.* at 660 (quoting *Albemarle*, 422 U.S. at 425).

³² *Id.* at 661 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (O'Connor, J., joined by Rehnquist, C.J., White, and Scalia, JJ.)).

³³ *Griggs*, 401 U.S. at 436.

³⁴ *Id.* at 431. The Court did not explicate its analysis further since the challenged criteria, which were adopted to "improve the overall quality of . . . [defendant's] work force" and "without meaningful study of their relationship to job-performance ability," fell without more.

³⁵ See Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1005 (1984) [hereinafter "*Employment Discrimination Against the Handicapped*"] ("[A]lthough courts . . . have understood nondiscrimination to require selection based upon merit, they have meant by 'merit' not 'general excellence,' but rather the 'possession of precisely those qualities of excellence needed to perform a functionally defined task.' The equal

Deference is paid to how employers structure their businesses with judicial oversight narrowly limited to insuring that practices which screen out minorities and women actually are job-related.³⁶ As the Ninth Circuit Court of Appeals explained in a Title VII case, "Congress was concerned about preserving employer freedom, and . . . it acted to mandate color-blindness with as little intrusion into the free enterprise system as possible."³⁷ This view of *Griggs* places little burden on employers to avoid the harm occasioned by the disparate effects of their job-related practices.

Yet, *Griggs* can also be read more broadly to require that employers take steps to mitigate harm. Chief Justice Burger further observed that:

[T]ests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has . . . provided that the vessel in which the milk is proffered be one all seekers can use . . . [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.³⁸

treatment model accordingly is satisfied when employers treat each employee or prospective employee as a vehicle for performing tasks and maximizing profits. Hence the traditional paradigm of discrimination implicitly adopts the view that employment should be regarded as a means to employer-defined ends in a competitive market rather than as an end in itself." (footnotes omitted)).

³⁶ *Id.* at 1004-05. See *Griggs*, 401 U.S. at 436.

³⁷ *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1278 (9th Cir. 1981), cert. den., 455 U.S. 1021 (1982) (quoted in *Employment Discrimination Against the Handicapped*, supra note 35, at 1005 n.48). See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." (quoted in *Employment Discrimination Against the Handicapped*, supra note 35)).

³⁸ *Griggs*, 401 U.S. at 431 (For example, "whether testing requirements that take into account capability for the next succeeding position or a related future promotion . . . fulfill a genuine business need" was a question raised but not reached in *Griggs*. See *Albemarle*, 422 U.S. at 433-34 ("In *Griggs* . . . the Court left [that question] open.")).

In recasting that touchstone as "a reasoned review of the employer's justification,"³⁹ the Court in *Wards Cove* rejected the broader view of *Griggs* and, with it, any "requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."⁴⁰ Congress, however, set *Wards Cove* aside in the Civil Rights Act of 1991,⁴¹ but failed to provide a clear substitute in its place. Though the Act undoubtedly imposed upon employers the burden of persuasion in rebutting a prima facie case of disparate impact⁴² (to demonstrate that the challenged practice was "job related for the position in question and consistent with business necessity"),⁴³ it construed that burden (along with plaintiff's burden of proving pretext through demonstrating the availability of alternative employment practices)⁴⁴ by referring exclusively to *Griggs* and its pre-*Wards Cove*

³⁹ *Wards Cove*, 490 U.S. at 659.

⁴⁰ *Id.*

⁴¹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071 ("[T]he decision of the Supreme Court in *Wards Cove* . . . has weakened the scope and effectiveness of Federal civil rights protections"); *id.* § 3(2) ("The purposes of this Act are . . . to codify the concepts of 'business necessity' and 'job-related' enunciated . . . in *Griggs* . . . and in the other Supreme Court decisions prior to *Wards Cove*").

⁴² See *id.* § 104(m) (codified at 42 U.S.C. § 2000e(m)) ("[T]he term 'demonstrates' means meets the burden of production and persuasion."); *id.* § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)) ("An unlawful employment practice based on disparate impact is established under this title only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .").

⁴³ Civil Rights Act of 1991 § 105(a) (as codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

⁴⁴ See *id.* (as codified at § 2000e-2(k)(1)(A)(ii)) ("An unlawful employment practice based on disparate impact is established under this title only if . . . the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.").

progeny.⁴⁵ To contend that those cases provide clear guidance is regrettably optimistic.⁴⁶

Given the politically charged legislation involved, that Congress sidestepped this issue is not surprising. However, the unavoidable result is that restrictive readings are still possible, unless Congress satisfied the concerns voiced by the Court in *Wards Cove*. That Court had cautioned against imposing burdens "almost impossible for most employers to meet . . . [that] would result in a host of evils[, including quota hiring.]"⁴⁷

The standard Congress set forth in the ADA, however, addresses these concerns. On the one hand, that standard obliges employers to take into account "the posture and condition"⁴⁸ of the nation's "largest minority";⁴⁹ on the other hand,

⁴⁵ See *id.* § 105(b) ("No statements other than the interpretative memorandum appearing at Vol. 137 Congressional Record S15,276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove* — Business necessity/cumulation/alternative business practice."); 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) (interpretative memorandum) ("[T]he exclusive legislative history is as follows: The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court decisions prior to *Wards Cove*."). See also Civil Rights Act of 1991 § 105(a)(1)(C) (codified at 42 U.S.C. § 2000e-2(k)(1)(C)) (Plaintiffs' demonstration of an alternative employment practice "shall be in accordance with the law as it existed on June 4, 1989 [the day prior to *Wards Cove*], with respect to the concept of 'alternative employment practice.'"). This approved history nowhere refers to the ADA passed only one year earlier.

⁴⁶ Compare *Connecticut v. Teal*, 457 U.S. 440 (1982) with *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (O'Connor, J., joined by Rehnquist, C.J., White, and Scalia, JJ.) (concerning the applicability of the EEOC Guidelines' "four-fifths rule" in determining the degree of disproportionality needed to make out a *prima facie* case); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) with *Washington v. Davis*, 426 U.S. 229 (1976) (concerning whether training program success validation rather than job success validation is sufficient to satisfy the "job-related" requirement); *Watson*, 487 U.S. 977 (O'Connor, J.) with *id.* (Blackmun, J., concurring in part and concurring in judgment) (concerning whether formal validation is required for subjective criteria with disparate impact); *Albemarle*, 422 U.S. 405 with *Watson*, 487 U.S. 977 (O'Connor, J.) (no definitive guidance on when alternative practices with less disparate impact are sufficiently available to constitute pretext if not adopted).

⁴⁷ *Wards Cove*, 490 U.S. at 659.

⁴⁸ *Griggs*, 401 U.S. at 431.

⁴⁹ See S. REP. NO. 116, *supra* note 10, at 9 (statement of then Vice Presi-

it frees employers when that duty unduly trammels their particular needs. The ADA and its balanced approach to employers and employees alike thereby can help guide future disparate impact analysis under Title VII.

Simply put, the ADA directs that employment practices involving a disparate effect must be essential for the job in question. Specifically, selection criteria that screen out disabled workers not only must be "job-related," but also "consistent with business necessity."⁵⁰ Although the ADA provides no express definition, "business necessity" corresponds to the term "essential functions" of the job in question⁵¹ — "job tasks that are fundamental and not marginal"⁵² — that disabled individuals must meet to be qualified under the ADA.⁵³ Thus, only chal-

dent Bush); 135 CONG. REC. S10,708 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin); *id.* at E1575 (daily ed. May 9, 1989) (statement of Rep. Coelho).

⁵⁰ 42 U.S.C. § 12112(b)(6). See 29 C.F.R. § 1630.10. See also 42 U.S.C. § 12113(a) ("It may be a defense . . . that an alleged application of qualification standards, tests, or selection criteria . . . has been shown to be job-related and consistent with business necessity."); 29 C.F.R. § 1630.15(b)(1).

⁵¹ See S. REP. NO. 116, *supra* note 10, at 26 ("In determining what constitutes the essential functions of the job, consideration should be given to the employer's judgment regarding what functions are essential as a matter of business necessity."); H.R. REP. NO. 485, pt. 2, *supra* note 10, at 55; 136 CONG. REC. H2,315 (daily ed. May 15, 1990) (statement of Rep. DeLay); 29 C.F.R. pt. 1630, 56 Fed. Reg. 35,749 (1991) (Interpretative Guidelines) ("Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.").

⁵² S. REP. NO. 116, *supra* note 10, at 26. See H.R. REP. NO. 485, pt. 2, *supra* note 10, at 55; 136 CONG. REC. H2,599 (daily ed. May 22, 1990) (statement of Rep. Fish); 29 C.F.R. § 1630.2(n)(1) (1991) ("The term 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position.").

⁵³ See 42 U.S.C. § 12111(8) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."). Cf. 29 C.F.R. § 1630.2(m) ("Qualified individual with a disability" means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."). The quoted regulation distinguishes between functions of the employment position and requisite job-related requirements, perhaps implying that "essential" as a standard for "business necessity" applies in only the former case. But see 29 C.F.R. pt. 1630, 56 Fed. Reg. 35749

lenged practices that relate to job essentials will survive the ADA's scrutiny.

Congress placed upon employers the burden of showing relation to job essentials as a defense to plaintiffs' claims,⁵⁴ though scope of the burden was not resolved definitively when the ADA was passed.⁵⁵ However, courts likely will construe that burden as one of persuasion, especially given the related amendment of Title VII in the Civil Rights Act of 1991.⁵⁶

In that regard, the employer's judgment about which functions of a job are essential, though plainly relevant,⁵⁷ is not controlling.⁵⁸ The ADA requires a balanced review of the employee's abilities and the employer's needs⁵⁹ — the central question is whether the employer would be harmed unreasonably if the disabled worker did not perform the function in

(1991) (Interpretative Guidelines). But these categories are not materially different. Skill, experience, education, and the like are used to predict future functioning by estimating present ability. As selection criteria, they can likewise screen out workers on the basis of disability (for example, skills not acquired or education denied because of a disabling condition). They accordingly warrant no less scrutiny than afforded functional criteria.

⁵⁴ See 42 U.S.C. § 12113(a); S. REP. NO. 116, *supra* note 10, at 40; H.R. REP. NO. 485, pt. 2, *supra* note 10, at 76; 136 CONG. REC. H2421 (daily ed. May 17, 1990) (statement of Rep. Levine); 29 C.F.R. § 1630.15(b)(1).

⁵⁵ See S. REP. NO. 116, *supra* note 10, at 38 ("The Committee [on Labor and Human Resources] intends that the burden of proof . . . be construed in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act as of June 4, 1989 [the day before *Wards Cove* was rendered]. See, e.g., 45 C.F.R. § 84.13 . . ."); H.R. REP. NO. 485, pt. 2, *supra* note 10, at 71; 45 C.F.R. app. pt. 84 at 382 (Section 84.13 "is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs*.").

⁵⁶ See *supra* note 42.

⁵⁷ See 42 U.S.C. § 12111(8) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."); 29 C.F.R. § 1630.2(n)(3)(i) & (ii).

⁵⁸ See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, 33 (1990) (stating that the House Committee on the Judiciary specifically rejected an amendment that would have created a rebuttable presumption in favor of the employer's judgment concerning what functions are essential).

⁵⁹ See S. REP. NO. 116, *supra* note 10, at 26; H.R. REP. NO. 485, pt. 2, *supra* note 10, at 55; 29 C.F.R. pt. 1630, 56 Fed. Reg. 35,749 (1991) (Interpretative Guidelines). See also *Strathie v. Dept. of Transp.*, 716 F.2d 227, 232 (3rd Cir. 1983).

question — of necessity, a case-by-case review of diverse factors.⁶⁰

The ADA, however, requires employers to consider accommodations⁶¹ that may permit the employee to perform satisfactorily, even when a court finds a function is essential to the job.⁶² The ADA fails to specify who has the initial burden of identifying whether such accommodations exist.⁶³ However, case law under the Rehabilitation Act requires plaintiffs, with their superior knowledge of what adjustments they may need, to make out "a facial showing or at least plausible reasons to believe that the handicap can be accommodated";⁶⁴ Congress intended that burdens of proof under the ADA be consistent with those under the Rehabilitation Act.⁶⁵

In contrast, that employers have the burden of persuasion that possible accommodations are unacceptable is hardly doubted.⁶⁶ To succeed, they must show that the accommodation at

⁶⁰ Such factors include (1) whether "the reason the position exists is to perform that function," 29 C.F.R. § 1630.2(n)(2)(i); (2) whether there is a "limited number of employees available among whom the performance of that job function can be distributed," *id.* at § 1630.2(n)(2)(ii); and (3) whether the function is "highly specialized so that the incumbent . . . is hired for [that] expertise or ability," *id.* at § 1630.2(n)(2)(iii); with consideration given, *inter alia*, to (1) "[t]he amount of time spent on the job performing the function," *id.* at § 1630.2(n)(3)(iii); (2) "[t]he consequences of not requiring the incumbent to perform the function," *id.* at § 1630.2(n)(3)(iv); and (3) "the terms of a collective bargaining agreement," *id.* at § 1630.2(n)(3)(v).

⁶¹ See 42 U.S.C. § 12111(9) (Supp. II 1990) (including, for example, the provision of qualified readers or interpreters, acquisition or modification of equipment or devices, removal of architectural barriers, allowance of part-time or modified work schedules, or other adjustments or modifications of policies); 29 C.F.R. § 1630.2(m).

⁶² See 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990); 29 C.F.R. § 1630.9.

⁶³ Cf. S. REP. NO. 116, *supra* note 10, at 33-34; H.R. REP. NO. 485, pt. 2, *supra* note 10, at 64-65.

⁶⁴ *Prewit v. U.S. Postal Service*, 662 F.2d 292, 310 (5th Cir. 1981).

⁶⁵ See S. REP. NO. 116, *supra* note 10, at 38; H.R. REP. NO. 485, pt. 2, *supra* note 10, at 71.

⁶⁶ See 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990) ("[T]he term 'discriminate' includes — not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [such employer]"); 29 C.F.R. § 1630.9(a). Cf. *Prewit*, 662 F.2d at 308-309.

issue would impose an "undue hardship,"⁶⁷ defined as "requiring significant difficulty or expense."⁶⁸ This limits business discretion far more than the equivalence required of less onerous alternatives in *Wards Cove*,⁶⁹ since under the ADA the employer's duty to accommodate is not meant to guard against employer pretext but to require reasonable mitigation of exclusionary effects.⁷⁰

⁶⁷ See 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990); 29 C.F.R. § 1630.9.

⁶⁸ 42 U.S.C. § 12111(10)(A). See 29 C.F.R. § 1630.2(p)(1). The factors considered in determining "undue hardship" are as follows:

- (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the work force of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Id. at § 1630.2(p)(2). See 42 U.S.C. § 12111(10)(B).

⁶⁹ See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); see also discussion *supra* notes 28-32 and accompanying text.

⁷⁰ Compare S. REP. NO. 116, *supra* note 10, at 35 ("In situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity ([defined as] an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities). The expressed choice of the applicant or employee shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity or that the accommodation requested would pose an undue hardship.") with *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60 (1986) (holding that an employer satisfies the duty to accommodate its employee's religious beliefs under Title VII by providing any reasonable accommodation (that would not impose "undue hardship"), and is not required to adopt the most reasonable accommodation or the one proposed by its employee).

Job requirements specifying functional abilities technically discriminate intentionally on the basis of disability, although not necessarily in an invidious way. In that regard, they correspond to the intentional use of religion, sex, or national origin as employment criteria, permitted under Title VII "in those certain instances where . . . [their use] is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business."⁷¹ The United States Supreme Court's narrow construction of that exception⁷² raises a basic question about the utility of the ADA as a model for Title VII enforcement. As Justice Brennan once remarked, "what differentiates sex from . . . intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform."⁷³

In contrast to sex characteristics themselves, choices that women are more likely to make with respect to child or parental care may well hinder their ability to perform in a work milieu still dominated by male norms. Yet the fairness that requires employers reasonably to accommodate the needs of their disabled employees, by "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment,"⁷⁴ or by permitting part-time or modified work schedules,⁷⁵ also should direct attention to the "posture and condition" of women workers when inflexible family leave policies have a needless

⁷¹ 42 U.S.C. § 2000e-2(e)(1).

⁷² See *UAW v. Johnson Controls*, 111 S. Ct. 1196, 1206 (1991) ("[T]he safety exception [part of the bona fide occupational qualification (BFOQ) defense] is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job [which was not the case with defendant's fetal protection policy]. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job."). Fetal protection policies, as they involve questions of disability (protecting fetuses from disabling conditions) and procreative decision-making, raise issues of "deep social concern," *id.*, not only because they affect women workers but also because they involve attitudes toward the value placed on disabled life.

⁷³ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Cf. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987) (Brennan, J.) ("[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." (footnote omitted)).

⁷⁴ 29 C.F.R. app. pt. § 1630, 56 Fed. Reg. 35744 (1991) (Interpretative Guidelines).

⁷⁵ 29 C.F.R. § 1630.2(o).

disparate impact.⁷⁶ Any resulting changes inevitably would apply to male and female workers alike — fostering more equitable sharing of family responsibilities and furthering an ideal, with which I agree, that the fundamental purpose of economic life is not profit or domination, but service of the human person, and indeed the whole person.⁷⁷

⁷⁶ Compare *id.* ("[I]t is not the intent of this part to second guess an employer's business judgment with regard to production standards.") with *EEOC v. Sears*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (rejecting a sex discrimination claim against Sears' commission sales structure).

⁷⁷ THE DOCUMENTS OF THE VATICAN II 273 (W. Abbott ed., 1966).